IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 15, 2006 Session

BRENDA GRIMSLEY v. ZACK KITTRELL

Appeal from the Circuit Court for Maury County
No. 11179 Robert L. Jones, Judge

No. M2005-02452-COA-R3-CV - Filed on September 29, 2006

This appeal involves a plaintiff's efforts to pursue a personal injury claim arising from a rear-end collision. The plaintiff obtained a judgment for the damages to her automobile in the Maury County General Sessions Court and then filed suit to recover her personal injuries in the Circuit Court for Maury County. When the defendant moved for a summary judgment based on res judicata, the plaintiff argued that the defendant should not be permitted to assert this defense because he had stood silent when she announced in the general sessions court that she was reserving her personal injury claims for a later proceeding. The trial court granted the motion for summary judgment and dismissed the plaintiff's personal injury claim. The plaintiff appealed. We have determined, as a matter of law, that the single injury rule prevents plaintiffs from splitting their causes of action and that the defendant neither waived nor should be estopped from asserting a res judicata defense based on the plaintiff's decision to split her claim against the defendant.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Mark Chapman, Nashville, Tennessee, for the appellant, Brenda Grimsley.

Patrick Flynn and Michael D. Cox, Columbia, Tennessee, for the appellee, Zack Kittrell.

OPINION

I.

On March 18, 2004, Brenda Grimsley's automobile was struck from behind by an automobile owned by Zack Kittrell that was being driven by Mr. Kittrell's minor daughter. Ms. Grimsley's automobile was damaged, and she sustained personal injuries. Ms. Grimsley entered into negotiations with Mr. Kittrell's insurance company, Tennessee Farmers Mutual Insurance Company (Tennessee Farmers Mutual), but these negotiations reached an impasse.

The collision left Ms. Grimsley without transportation and without the funds to repair or replace her damaged automobile. In light of the impasse with Tennessee Farmers Mutual, Ms. Grimsley's lawyer decided to sue Mr. Kittrell in the Maury County General Sessions Court to recover for the damages to her automobile and then to pursue Ms. Grimsley's personal injury claims in the Circuit Court for Maury County. Accordingly, the warrant Ms. Grimsley's lawyer filed against Mr. Kittrell in the general sessions court stated that Ms. Grimsley was seeking property damages only and that she was reserving her personal injury claim.

The case was heard in the general sessions court on August 17, 2004. Ms. Grimsley's lawyer announced to the court that he was "reserving" Ms. Grimsley's personal injury claims and that the only claim before the court was Ms. Grimsley's property damage claim. Mr. Kittrell's lawyer acknowledged that he understood what Ms. Grimsley's lawyer was doing and offered no objection. Thereafter, the general sessions court awarded Ms. Grimsley a $4,800 judgment against Mr. Kittrell. Neither party appealed. Tennessee Farmers Mutual subsequently issued a check made payable to Ms. Grimsley and her lawyer. They cashed the check with an endorsement stating "full reservation of rights."

On March 10, 2005, Ms. Grimsley filed suit against Mr. Kittrell in the Circuit Court for Maury County seeking to recover damages for the personal injuries she suffered in the March 18, 2004 collision. Mr. Kittrell filed a motion for summary judgment asserting res judicata. He argued that Ms. Grimsley should not be permitted to split her cause of action and that the doctrine of res judicata barred her personal injury claim because she could have raised it in the general sessions proceeding but did not. Ms. Grimsley responded by insisting that Mr. Kittrell either waived or was estopped to assert a res judicata defense because his lawyer had "agreed" that the general sessions court proceeding involved only her property damage claim. She filed her own affidavit and her lawyer's affidavit to support her opposition to Mr. Kittrell's motion.

The trial court heard Mr. Kittrell's motion on September 23, 2005. Five days later, the court filed an order granting Mr. Kittrell's summary judgment motion and dismissing Ms. Grimsley's claim with prejudice. Ms. Grimsley has perfected this appeal.

II.

The doctrine that prohibits plaintiffs from splitting single, indivisible causes of action, commonly referred to as the "single injury rule," is well-known to lawyers in Tennessee. The Tennessee Supreme Court recognized it over one hundred and fifty years ago.[1] The doctrine, which is based on the doctrine of res judicata,[2] provides that

[1] *Saddler v. Apple*, 28 Tenn. (9 Hum.) 342, 344 (1848) (holding that an entire, indivisible cause of action, either in tort or contract, cannot be split up into separate suits).

[2] *Potts v. Celotex Corp.*, 796 S.W.2d 678, 682 (Tenn. 1990).

> A single tort can be the foundation for but one claim for damages. . . . All damages which can, by any possibility, result from a single tort form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit: the unlawful act, and all damages that can arise out of it. For damages alone, no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained.

Railroad v. Brigman, 95 Tenn. 624, 627-28, 32 S.W. 762, 763 (1895). Twenty years later, the Tennessee Supreme Court elaborated on its holding in *Railroad v. Brigman* by pointing out that

> [I]f the plaintiff, suing for damages for injuries resulting from a single tort, does not include in his suit all the injuries sustained, a subsequent suit for those omitted will be barred upon a plea of *res adjudicata* aptly pleaded. This follows naturally from the conclusion that the recovery is for the tort, and not for the injuries. If "a single tort can be the foundation for but one claim for damages," it inevitably follows that there can be but one suit to recover for injuries resulting from that tort.

Smith v. Cincinnati, N.O. & T.P. Ry., 136 Tenn. 282, 286, 189 S.W. 367, 368 (1916); *see also Potts v. Celotex Corp.*, 796 S.W.2d at 682.

This court recently upheld an application of the single injury rule in a case strikingly similar to this one. *Duvall v. Mobley*, No. 01A01-9810-CV-00530, 1999 WL 430454 (Tenn. Ct. App. June 29, 1999) (No Tenn. R. App. P. 11 application filed). Following a collision between two automobiles, Richard Duvall filed a warrant in the Davidson County General Sessions Court to recover property damages from Artie Mobley, the driver of the other automobile. Mr. Duvall recovered $9,000 in the general sessions court. Approximately one month later, Mr. Duvall filed a second suit against Mr. Mobley in the Circuit Court for Davidson County to recover damages for the personal injuries he sustained in the same accident. We affirmed the trial court's dismissal of the suit based on the doctrine of res judicata. *Duvall v. Mobley*, 1999 WL 430454, at *1-2.

III.

Ms. Grimsley concedes, as she must, that her tort claim against Mr. Kittrell is a single, indivisible cause of action to which the single injury rule applies. However, she insists that the trial court erred by dismissing her personal injury claim because Mr. Kittrell's lawyer waived Mr. Kittrell's right to rely on the single injury rule by acquiescing with her lawyer's announced intention to attempt to recover for the damage to her automobile in the general sessions court and then to pursue her claim for personal injuries in the circuit court. She also insists that Mr. Kittrell should be estopped from asserting a res judicata defense based on the single injury rule.

A.

Ms. Grimsley insists that the trial court erred by disposing of her waiver argument by summary judgment because the affidavits she submitted in opposition to Mr. Kittrell's motion created genuine and material factual disputes sufficient to defeat Mr. Kittrell's motion for summary judgment. We have carefully scrutinized these affidavits and do not find that they are sufficient to stave off Mr. Kittrell's motion.

Ms. Grimsley states in her four-sentence affidavit that she "witnessed the Defendant's Attorney, Michael Cox and my attorney, Mark Chapman state to Judge J. Matthews that only the damage portion of the case would be discussed in the hearing [in general sessions court] and that the injury claim was reserved." She also states that "this [Ms. Grimsley's decision to pursue her personal injuries in a separate proceeding] had also been the subject of conversations between Michael Cox and Mark Chapman in the hall outside the courtroom prior to each court appearance on this case."

Mr. Chapman's affidavit is similarly vague. He states that Michael Cox "knew the General Sessions warrant had reserved the injury claim" because they had discussed this decision during several telephone calls. He also states that Mr. Cox had "acknowledged" his understanding that Ms. Grimsley had decided to pursue only her property damage claim in general sessions court and that both he and Mr. Cox "made Judge J. Matthews aware in open court that the hearing would only involve the damages claim and that the injury claim would be reserved." Finally, Mr. Chapman's affidavit states that he contacted Mr. Cox after receiving a general release regarding both Ms. Grimsley's property damage and personal injury claims to complain about the release but that Tennessee Farmers Mutual declined to re-issue a check limited solely to the property damage claim.

A waiver is a voluntary relinquishment of a known right or the foregoing of some benefit to which a party is entitled. *Reed v. Washington County Bd. of Educ.*, 756 S.W.2d 250, 255 (Tenn. 1988); *Austa La Vista, LLC v. Mariner's Pointe Interval Owners Ass'n, Inc.*, 173 S.W.3d 786, 794 n.1 (Tenn. Ct. App. 2005). It may take the form of (1) express declarations, (2) acts and declarations manifesting not to rely on a right or to claim an advantage, or (3) failing to act when action would reasonably have been expected. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003); *Baird v. Fidelity-Phenix Fire Ins. Co.*, 178 Tenn. 653, 665, 162 S.W.2d 384, 389 (1942); *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 722 (Tenn. Ct. App. 1998).

An express waiver is an oral or written statement giving up known rights or privileges. An implied waiver occurs when a party's conduct, although perhaps not the party's words, shows the party's conscious choice to give up rights or to forego benefits. *Hoefler v. Hoefler*, No. M1998-00966-COA-R3-CV, 2001 WL 327897, at *4 (Tenn. Ct. App. Apr. 5, 2001) (No Tenn. R. App. P. 11 application filed). To amount to a waiver, the conduct must be the result of a conscious, voluntary choice, and must provide clear, unequivocal, and decisive evidence of the party's intent and purpose to forego a right or benefit. *Kentucky Nat'l Ins. Co. v. Gardner*, 6 S.W.3d 493, 498-99

(Tenn. Ct. App. 1999); *Springfield Tobacco Redryers Corp. v. City of Springfield*, 41 Tenn. App. 254, 274-75, 293 S.W.2d 189, 198 (1956).

Taking the statements in Ms. Grimsley's and Mr. Chapman's affidavits as true, as we must in summary judgment proceedings, we have concluded that they fail to substantiate Ms. Grimsley's claim that Mr. Kittrell's lawyer waived his client's right to invoke the single injury rule as a defense to her later personal injury claim. The only reasonable interpretation of these statements is that Mr. Kittrell's lawyer simply acknowledged and acquiesced in the tactical decision by Ms. Grimsley's lawyer to pursue only the property damage claim in general sessions court. Mr. Kittrell's lawyer's statements and conduct reflect his understanding that the lawyer representing Ms. Grimsley desired to "reserve" her personal injury claim. The statements do not establish that Mr. Kittrell affirmatively agreed to forbear raising the single injury rule in a later proceeding.[3]

B.

Ms. Grimsley also asserts that Mr. Kittrell's lawyer "induced" her to believe that Mr. Kittrell would not object to her pursuing her personal injury claim in a later proceeding. While Ms. Grimsley's choice of words gives us some pause, we have determined that Ms. Grimsley does not intend to accuse Mr. Kittrell's lawyer of unethical behavior but rather intends to assert that Mr. Kittrell's lawyer's acquiescence in her lawyer's decision to split her tort claim should estop Mr. Kittrell from relying on the single injury rule in the circuit court proceeding.

The doctrine of estoppel is founded on the fundamental duty of fair dealing imposed by law. It protects, rather than creates, rights, *Franklin v. St. Paul Fire & Marine Ins. Co.*, 534 S.W.2d 661, 666 (Tenn. Ct. App. 1975), and is invoked in appropriate circumstances to prevent a party from taking unfair advantage of another party's justifiable reliance on his or her representations or conduct. The traditional elements of equitable estoppel are: (1) acts or statements that mislead a party, (2) who lacks knowledge of the facts and who is entitled in good faith to rely on the acts or statements in question, and (3) a consequent change in position to the relying party's detriment. *Roach v. Renfro*, 989 S.W.2d 335, 339 (Tenn. Ct. App. 1998); *Sexton v. Sevier County*, 948 S.W.2d 747, 751 (Tenn. Ct. App. 1997).

Parties seeking to invoke the doctrine of equitable estoppel have the burden of proving each and every element. *Robinson v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d 559, 563 (Tenn. Ct. App. 1993). Although silence or inaction can support an estoppel claim, they will do so only in circumstances where there is a duty to speak or act. *Church of Christ v. McDonald*, 180 Tenn. 86, 97, 171 S.W.2d 817, 821 (1943); *State ex rel. Grant v. Proprais*, 979 S.W.2d 594, 601 (Tenn. Ct. App. 1997); *Hankins v. Waddell*, 26 Tenn. App. 71, 77-78, 167 S.W.2d 694, 696 (1942).

[3]Ms. Grimsley also suggests that Mr. Kittrell waived his res judicata defense by failing to assert it in the general sessions court. This is illogical. One cannot assert a res judicata defense until a first proceeding has concluded and a second proceeding has commenced.

This case involves a well-intended, yet ill-advised, tactical decision by Ms. Grimsley's lawyer. In a desire to obtain funds to enable his client to repair or replace her damaged automobile, Ms. Grimsley's lawyer decided to split her cause of action against Mr. Kittrell by seeking a recovery for her property damages in general sessions court and then by filing a second suit in circuit court to recover for her personal injuries. He announced his intention both to Mr. Kittrell's lawyer and to the general sessions judge. Mr. Kittrell's lawyer acknowledged that he understood what Ms. Grimsley's lawyer was doing but did not warn him of the consequences of his strategy or try to talk him out of it.

Mr. Kittrell's lawyer's duty was to his client, not to Ms. Grimsley. He had no ethical obligation to advise Ms. Grimsley's lawyer that splitting his client's cause of action would be fatal to her later personal injury claim. Ms. Grimsley's lawyer conceded as much during oral argument.[4] Mr. Kittrell's lawyer's obligation would have been different had Ms. Grimsley's lawyer asked him directly to waive his client's res judicata defense to a later lawsuit for personal injuries. In that circumstance, Mr. Kittrell's lawyer would have been required to give a direct response, and had he expressly agreed to waive objections to a later personal injury claim, then Ms. Grimsley would have a colorable factual basis for an estoppel claim.

The affidavits submitted by Ms. Grimsley and her lawyer establish only that Mr. Kittrell's lawyer acknowledged and acquiesced in Ms. Grimsley's lawyer's decision to split Ms. Grimsley's cause of action. They do not establish that Mr. Kittrell's lawyer agreed not to assert a res judicata defense in the later proceeding. Without evidence of this sort, Ms. Grimsley's estoppel claim is doomed to failure.

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[4]The following exchange illustrates Ms. Grimsley's lawyer's awareness of opposing counsel's obligations:

> THE COURT: [The claim] was reserved, but that doesn't go so far as to say "and it could be asserted at a later day or in Circuit Court."
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> MR. CHAPMAN: And that is correct. The affidavit says what it says, and so the Circuit Court judge was left to look at that. And if he believed that this was true, we argue that summary judgment should not have been granted.
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> THE COURT: Don't you agree that the defense attorney had no obligation to warn you that you might be stepping in a pretty serious hole?
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> MR. CHAPMAN: I agree with that, and what I also believe is that not only did Mr. Cox have the right not to tell me that and the right to protect his client, but he also, on behalf of his client, had the right to waive that res judicata part of his defense. And that's what we submit that he did.
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> THE COURT: That he waived it by remaining silent?
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> MR. CHAPMAN: Well, by presenting, by representing to the court and representing to me and my client that we would reserve this claim and deal with it later.

IV.

We affirm the judgment dismissing Ms. Grimsley's personal injury complaint and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal to Brenda Grimsley and her surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.